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Science, Law, and the Body. Looking for Individual Agency and Responsability

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Baudouin Dupret

SCIENCE, LAW, AND THE BODY

LOOKING FOR INDIVIDUAL AGENCY AND RESPONSIBILITY

In Egypt, most criminal cases are investigated on the basis of forensic medicine reports. To a lesser extent, personal status and civil cases are also referred to forensic doctors. In this type of documents, doctors provide the judge who mandated them with bodily and pathological descriptions. Classically, forensic medicine investigated various issues ranging from causes of death to psychological pathologies and used different techniques, among which fingerprinting is the most famous. With the progress of biology and genetics, new techniques like DNA profiling of samples found on the crime scene were introduced. Although endowed with discretionary powers, judges tend to ground their rulings on such reports. Technically, these descriptions are supposed to be disengaged instruments in the hands of neutral judges. Practically, forensic reports are highly implicative and consequential, both morally and legally.

In this paper, I proceed in five stages. First, I briefly discuss what can be considered as the "missing-what" of both legal and anthropological studies, which leads to better take into consideration the constraints and resources of practical legal work. Second, I review the notions of legal personality, capacity and responsibility in Egyptian criminal law, including the law concerning medical practice, showing that these textual references constitute the resources and the constraints with which participants in legal proceedings must deal. Third, I show how law on the books works for all practical legal purposes, that is, how it works as a practical tool in the hands of practitioners. Finally, I look at the details of forensic reports issued in two Egyptian cases in order to show how they are practically constituted and orient to the ascription of material causes and individual agencies to facts. By so doing, I shall describe how these documents come to play an active role in the grammar of legal responsibility, which is based in most modern legal systems on a relationship between a deed, a person and a link of causality between the former and the latter.

THE MISSING-WHAT OF SOCIO-LEGAL STUDIES

There are definitely many ways to deal with the issue of the law in general and in Egypt in particular, among which the historical, sociological, and anthropological perspectives. Through the reading of, among others Alan Watson (1974), Brian Tamanaha (1997), Ruud Peters (1999), Ron Shaham (1997) or Nathan Brown (1977), I learned a great deal. From Watson and Tamanaha, I learned about legal transplantation and about how much of law is out of step with the needs and desires of society, how much law possesses a life and vitality of its own, and how much transplanted law developed in a way that does not reflect local laws, norms, and customs. Peters taught me about the transformation of law in the nineteenth century, from the *qâdî*'s jurisdiction complemented by a system of law enforcement by the executive gradually evolving into a much more complex and sophisticated type of justice administered by a fully-fledged judiciary later on replaced by a French-type court system. Shaham shed light on the issue of adjudication of partly codified Islamic law by judges integrated in a reformed judicial system, and how these judges interpreted new legal provisions of the *sharî`a* in a way that showed their support for the reforms. Brown instructed me about why the legal system was constructed in its present form and the role it played in Arab societies, mainly at the political level but, also at the level of popular uses of the courts.

I learned a great deal, but, however, I got the strong feeling that I did not learn what I wanted to know, that there was a kind of "missing-what" in what I call the classical approach to law. This missing-what was the phenomenon of "law practicing" (the gerundive form of the word indicating its 'activity' nature). In other words, by looking for the law in the dynamics of history, research had lost the phenomenon of the law itself. The analysis was acutely grounded in concepts (codification process, positivization, modernization, etc.), categories (Islamic law, indigenous law, imported law, etc.) and theories (systemic, structural, realist, behavioural, etc.), but, by so doing, it probably missed an essential part of its object, perhaps even the core of its topic, i.e., the practice of writing, using, referring to, and dodging the law. In sum, the law was used as a resource for explaining larger issues, like change, power, domination, equality; however, the law was forgotten as a topic in its own right.

Let us take an example of this losing the phenomenon of the law. In his book *The Rule of Law in the Arab World*, Nathan Brown addresses the issue of the popular uses of courts in Egypt. Up to now, very little was said or written about "living law" in the Middle East, as opposed to the law which is found in legal treaties, case-law compendia, and formal rulings. Brown must be credited for having drawn our attention to the social dimension of law, and this is no little achievement. My contention, however, is that Brown, partly because of the kind of material upon which he is relying, partly because of his taking the law as a resource for explanations about the nature of politics in Egypt, tells us stories about the law and does not provide us with any description of the

law in and as practice. We certainly learn a lot about Cairene representations of the law, i.e., about the way in which some people of Cairo retrospectively (from *ex post facto*) and reactively (as answers to the questions raised by the people who conducted the survey) constructed narratives on legal matters in which they were involved. But we remain ignorant of the law as an empirical social practice, that is, something which is an ongoing accomplishment done in contingent settings by people oriented to the performance of their work, a work that is accountable, recognizable and made intelligible through the enactment of shared understandings for all practical purposes. In other words, we remain ignorant of what a particular population, e.g. prosecutors, does in particular settings, e.g. prosecution offices, to achieve the recognizability of particular practices, e.g. the practice of the penal code.

With regard to legal studies, it must be stressed that they tend to confuse legal practice and the documents resulting from these practices. In other words, they assimilate law on the books and law in action. However, there is obviously a gap between documents, formal renderings produced in jurisprudence, and court rulings and facts as they are supposed to report them. It must be attributed to "the transformation of locally accomplished, embodied, and 'lived' activities into disengaged textual documents." (Lynch, 1993: 287) This transformation process includes a conditional reduction of information. By reduction, I mean that it is only a part of available information that is selected so as to produce the "authorized" account of facts. By conditional reduction, it is meant that this selection depends on formal legal categories to which this factuality will be assigned. To ground analysis totally on the formalized and polished text of court rulings means to risk missing the phenomenon one seeks to study, i.e., judicial practice in general, and modes of reasoning in judicial settings, in particular. These rulings constitute only the *ex post facto* formalization of former practices, and not their description. In sum, the whole set of practical and contingent aspects, background expectations, people's orientations and situational constraints is erased for the sake of producing a retrospective account satisfying the requirements of its prospective use for all practical legal purposes. As Lynch (1993: 289) puts it, summarizing an anecdote told by Garfinkel in a non-published paper, "the *transformation* that is achieved from the rendering of the case is itself hidden whenever the case report becomes the relevant analytic datum."

However, legal activity is mainly communicative. It not only means that language is the means for implementing law, but also the means to transform facts into relevant legal objects, to give an evidence the authority to establish veracity of facts, and to interpret rules in a way that encapsulates facts in legally consequential categories. Following Gregory Matoesian (2001: 212), speaking of a rape trial:

> … language use actively and reciprocally shapes and organizes legal land cultural variables into communicative modes of institutionalized relevance. It constitutes the interactional medium through which evidence, statutes, and

> our gendered identities are improvisationally forged into legal significance for the trial proceedings. And it represents the primary mechanism for creating and negotiating legal realities, such as credibility, character, and inconsistency; for ascribing blame and allocating responsibility; and for constructing truth and knowledge about force, (non)consent, and sexual history.

In other words, when exclusively concentrating on formalized documents, we neglect the tortuous path followed by legal activity before it takes its definitive aspect. We forget that legal reasoning, to take this example only, is a social process along which people ascribe reasons, motives and explanations to various doings and sayings, in a way that does not only depend on the "objective historicity" of these facts, but also – and most obviously mainly – to contextual, situational, institutional, interactional and artifactual contingencies of fact production itself. It does not mean in any way that formalized legal documents do not deserve attention, quite to the contrary. Neither does it mean that legal reasoning, as it appears from the examination of these documents, cannot be studied by itself and for itself. As we saw it, they constitute the basis on which later judicial decisions will be taken, a basis that practitioners consider as reliable; these formalized rulings constitute as such, in their own right, legitimate research topics. However, they cannot be taken as neither the main, nor the sole source of judicial activity and reasoning as a whole. It is at such level that we speak of the necessity of some praxiological re-specification: instead of producing accounts of accounts and documents abstracted from the concrete and lived conditions of the process through which they were produced; and instead of dissociating documents from the activity consisting in producing the document, the ethnomethodological study of judicial work aims at considering both parts of the pair (the document and the documentary activity) at the same time, as indispensable to, and indissociable from, each other for the adequate understanding of the phenomenon under consideration (cf. Livingston, 1987; Lynch, 1993: 287-99). This approach runs obviously against the semiotic perspective, which considers the formal rendering in a relation of equivalence with the activity in which this account originates, although we must focus on formal accounts as local and reflexive activities conducted for purposes that are legal, practical, and forgetting of their own historicity. Such is the type of incommensurable relationship in which testimonies and rulings, *ex post facto* formalizations and synchronic transcripts, Court of Cassation rulings and Prosecution interrogations, conventional historical narratives and situated stories are embedded. (Lynch & Bogen, 1996: 164)[1]

Texts constitute the practical context of a good deal of legal activities. While they do not represent an actual account of the many steps that lead to their formalisation, they form the constraining horizon to which the many parties orient within the course of their legal and judicial activities. In other words, texts provide the parties with the frame within which they move and according to which they embed their action. In that sense, people do not share

any relativistic conception of legal categories. Legal reasoning, like mundane reasoning, postulates the objectivity and intersubjectivity of daily social reality (Pollner, 1987). The world is considered as an object and this objectivity is never doubted. It works as a background scheme of interpretation allowing ordinary inferences and interpretations to be intelligible and accountable.

DEFINING THE PERSON, ITS CAPACITY AND ITS RESPONSIBILITY IN EGYPTIAN CRIMINAL LAW

According to Egyptian jurisprudence's general theory of crime, crime (*al-jarîma*) is defined as "an illegitimate action produced by a criminal will for which the law stipulates a sanction or precautionary measures." (Husni, 1989: 40)[2] The constitutive parts of this definition are decomposed as follows: (1) Crime supposes that an action (*fi`l*) be committed either actively (commission) or passively (abstention); (2) This action must be illegitimate (*ghayr mashrû`*) with regard to an explicit provision of criminal law and it must not be committed under circumstances that can excuse it; (3) This action must originate in a "criminal will" (*al-irâda al-jinâ'iyya*), i.e., a human will capable of distinction and free to choose that sought to perform this action and is therefore liable to it; if this will intended the consequences of this action, jurisprudence speaks of "criminal intent" (*al-qasd al-jinâ'î*), whereas it speaks of "unintentional fault" (*al-khata' ghayr al-`amdî*) when the will did not intend the consequences of this action; (4) The law must stipulate a sanction (*`uqûba*) or precautionary measures (*tadbîr ihtirâzî*).

Three general elements are constitutive of the crime: the legal element (*al-rukn al-shar`î*), the material element (*al-rukn al-mâddî*) and the moral element (*al-rukn al-ma`nawî*). First, the legal element made of three components: a doing, either active (the committing: "a tangible material component […] expressed by the author through the movements of his body's lungs with the aim to achieve precise material effects" (Husni, 1989: 374)) or passive (abstention: "someone's abstention of achieving a positive action which the legislature expected from him in precise circumstances" (Husni, 1989: 376);

1. On this relation between narratives and narratives accounts, and the contingent transformation of stories into history, there is a good amount of ethnomethodological work, among which we can quote Garfinkel (1974) on medical reports, Cicourel (1968) on police records, Zimmerman (1974) on facts construction as practical achievement, Meehan (1997) on police documentary activity, and Komter (2001) on the construction of evidence in police interrogations.

2. I draw most of the information concerning Egyptian criminal jurisprudence from Husni, 1989, which Egyptian jurists unanimously consider the most authoritative reference in the field.

the consequence of this doing (which is both "the transformation that happened in an external world as a result of the criminal behaviour" (Husni, 1989: 380) and "the offending doing that harmed an interest or a right which the legislature considered as worth being penally protected" (Husni, 1989: 381)); the causal relationship (*al-`alâqa al-sababiyya* or *`alâqa al-sababiyya*) linking the doing and its consequence ("the link that unifies the doing and the result and establishes that it is the committing of the doing that led to the occurring of the result" (Husni, 1989: 385)). Second, there is the moral element, i.e. the will that accompanies the action, in the form of either criminal intent (the results of the action were intended) or unintentional fault (the results were not intended). It is the moral element that conditions the infliction of a penalty to the committing of an offence by a human being. As Husni (1989: 501) points it, "nobody is accountable for an offence in which the material and psychological aspects do not combine." Third, there is the legal element, which can be defined as the illegitimate status of the action. It means that there must be a text that criminalizes this action and provides for the sanction of its perpetrator and that there must be no cause of justification (*sabab al-ibâha*). To these general elements, particular elements must be added that particularize crimes among each other. In the case of theft, for instance, the material element is made of the seizing of someone's good, while the moral element is made of the intent to seize this good, and the legal element by Article 318 of the Penal Code. Law takes also into consideration certain features subdividing the category (e.g., theft) and individualizing situations (e.g., theft during night-time, theft committed by someone acting under duress). These last features, not defined by the law, are left to the judge's discretionary power.

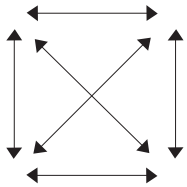
The moral element of the crime is the major constitutive element of criminal liability (*al-mas'ûliyya al-jinâ'iyya*), as its establishment presumes the existence of the legal and material elements of the crime, and, moreover since it itself conditions the establishment of criminal capacity (*al-ahliyya al-jinâ'iyya*), i.e. the capacity to be criminally liable. The core of the moral element in the crime is the criminal will, i.e., a will grounded on the breach of an explicit provision of the law. Since only human beings are, in this logics, endowed with will, only they can be taken as criminally liable. There are however various impediments to the enactment of criminal liability, which are defined as "the situations in which the will is devoid of legal value, which the law does not take into consideration, which do not provide any place for such a characterization, and in which the moral element of the crime is not constituted" (Husni, 1989: 521). Two conditions are required by the law to establish the will: faculty of discretion and free will. If one or both are missing, the impediment to liability is constituted. As for discretion, Husni explains it as follows: "The law incriminates the offender because of his orienting his will in a way that contradicts its provisions, and this will orientation cannot be ascribed except when [the offender] had the opportunity to know the many orientations his will could take and the orientation it actually took" (Husni, 1989: 522). As

for free will, it is defined as "the offender's capacity to delineate the orientation his will takes, i.e., his faculty to push his will in a specific direction among the different orientations it could have taken." (*ibid*) Since offenders have only limited mastery over the many factors surrounding their acts, their liability may be precluded by two types of causes: external causes, like duress or necessity, and internal causes, which depend on their mental and psychological state. As for the latter, Article 61 of the Penal Code stipulates: "No penalty can be inflicted to whoever lacks consciousness (*fâqid al-shu`ûr*) or has no choice (*fâqid al-ikhtiyâr*) in his action at the time of the commission of the act, be it because of insanity or mental disorder, or because of torpor (*ghaybûba)* originating in the ingestion of drugs, whatever their kind, if he was forced to take them or did not know that he was taking them."

Law No. 12 of 1996 regarding the child, which replaced Law on Juveniles No. 31 of 1974, stipulates in Article 2: "Within the scope of the provisions of this law, one means by 'child' whoever has not attained the age of 18 years." In Chapter 3, the law provides for the criminal aspects of dealing with children. Article 94 stipulates: "Criminal liability is denied to the child who has not attained the age of seven." Article 95 stipulates: "In compliance with the rule of Article 112 of this law [i.e., penalties applied to juveniles between 15 and 18 years of age are alleviated], the rules stipulated in this chapter apply to whoever has not attained the age of eighteen at the time of his committing the crime or when he was found in one of the situations of exposition to delinquency." Children above the age of seven and under the age of fifteen may be submitted to various measures: reprimand *(tawbîkh*) and delivery (*taslîm*), remanding to vocational training (*ilhâq bi al-tadrîb al-mihanî*), assigning to certain duties (*ilzâm bi-wâjibât mu`ayyana*), judicial control (*ikhtiyâr qadâ'î*), placement (*îdâ`*) in a social care institution or in a hospital, etc. (art. 101). Measures expire when the child attains the age of 21 (but judicial control can be extended for at most two years and psychiatric treatment can be extended as long as deemed necessary). Under the age of seven (art. 98) or if the child suffers mental weakness (art. 99), no measure can be taken except to refer him to specialized hospitals. Article 99 defines the mentally weak child as he who "is the victim of a mental or a psychological disease or a mental weakness, and the opinion is reached that he lacks totally or in part the capacity to understand or to choose, so that one fears for his security and the security of others." If the child is between 15 and 16 years of age, the penalties of capital punishment and hard labour are reduced respectively to prison and custody (or placement in a social care institution according to the discretion of the judge); penalties for misdemeanours may be reduced to judicial custody and placement. If the child is between 16 and 18, capital punishment is reduced to prison for at least 10 years; life at hard labour is reduced to prison for at least 7 years; temporary hard labour is reduced to prison (art. 112). Finally, Article 119 stipulates: "A juvenile who has not attained the age of fifteen may not be held in protective custody."

The combination of the two elements of majority and consciousness can be schematized in the following picture, which depicts the four different possible states of the person in Egyptian criminal law:

(a) majority / consciousness (d) majority / no consciousness



(b) minority / consciousness (c) minority / no consciousness

a) To these states of the person, correspond different types of criminal liability:

a Full liability is presumed for people who have attained the age of eighteen years of age and do not lack consciousness.

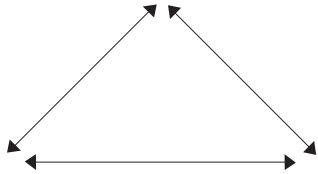
b Minors above the age of seven and not lacking consciousness are distinguished from minors above seven and under fifteen years of age (b′) and minors above fifteen (b″). Both are partially liable, but they are treated differently. Whereas no punishment can be imposed upon children under the age of fifteen, who can only be the object of precautionary measures, an alleviated punishment can be imposed on children above the age of fifteen, with a further distinction between children less than sixteen years old (b''^{1}) and children between sixteen and eighteen years old (b''^{2}), the former are given a penalty that is more lenient than the penalty given to the latter.

c Minors lacking consciousness, either because they are under seven years of age or because they suffer mental weakness, can be neither punished nor the object of above-mentioned measures.

d Majors lacking consciousness cannot be condemned to any penalty and can only be referred to a medical institution.

In sum, one must assess the existence of six states of the person. To these states correspond three types of liability: full liability, no liability, and limited liability. This can be schematized as follows:

(i) full liability
majority / consciousness [= (a)]



(ii) limited liability
minority / consciousness [= (b)]
- under 15 (b′)
- above 15 (b″)
  - # under 16 (b″[1])
  - # above 16 (b″[2])

(iii) no liability
- minority / no consciousness [= (c)]
- majority / no consciousness [= (d)]

b) Case-law

Although the Penal Code identifies two different types of mental weakness, from which different types of legal capacity and criminal liability follow, it does not define what mental weakness is. Here again, one must turn to the jurisprudence of the Court of Cassation, even though it does not seem to be able to answer this question in a satisfactory manner. Here follow some of the principles it established in the field of mental health.

According to the Court of Cassation, not all mental illnesses lead to an impediment of criminal liability (Court of Cassation, Compendium of Principles):

> It is established that the mental illness, which is characterized as insanity or mental disorder and by virtue of which there cannot be any legal liability, is an illness that in itself precludes consciousness and awareness. Most psychological illnesses and states in which the person does not lack consciousness and awareness cannot be considered as a cause for the absence of liability. The court is not obliged to appoint a technical expert in the case so as to define the scope of effect of the illness of the accused on his criminal liability, except for what depends on mere technical questions in which its appreciation is impossible (Case No. 3, 33rd judicial year, session of 26 March, 1963, Folio 14, p. 254; Case No. 986, 33rd judicial year, session of 22 October, 1963, Folio 14, p. 678).

Reference can only be made to insanity and mental disorder:

> Non-punishment because of the criminal's lack of consciousness and capacity to choose his action at the time of his committing the act has for its sole scope the reference of this state to insanity or disorder of the mind (Case No. 216, 24th judicial year, session of 13 April, 1964, Folio 15, p. 295; case No. 243, 38th judicial year, session of 25 March, 1968, Folio 19, p. 350).

Other types of mental illness must be defined before determining whether they fit the categories of insanity and mental disorder:

> He who suffers from the state known as 'psychopathic personality', which, from the scientific point of view, is considered as a psychological illness, is not deemed in the realm of law as suffering from insanity or disorder of the mind, in which case he may have been considered as lacking consciousness or choice in his action (Case No. 2313, 31st judicial year, session of 28 November, 1961, Folio 12, p. 942).

> Idiocy is a disorder of the mind that stops the growth of intellectual capacities before the achievement of the stage of natural maturity. Mental disorder does not require from he who suffers from it that he lacks awareness and will at the same time, but only that he lacks one of the two (Case No. 438, 36th judicial year, session of 23 May, 1966, Folio 17, p. 674).

Violent emotions and stress do not *per se* constitute mental disorders (cf. references given by Husni, 1989: 532, n. 1). Even insanity and mental disorder do not preclude criminal liability; it is the lack of consciousness and choice of action that precludes liability (cf. references given by Husni, 1989: 533, n. 1).

As for the reference to expertise, the Court of Cassation stipulates the judge's discretionary power:

> It is established that evaluating the opinions of experts, assessing their reports and adjudicating in objections which these reports address belongs to the court of merits, which has complete freedom to evaluate the probative force of the expert's report which is presented to it without being obliged either to appoint another expert or to return the question to the same expert, provided that the opinion on which it bases its decision is valid and does not oppose reason and law (Case No. 91, 45th judicial year, session of 3 March, 1975, Folio 26, p. 207).

Egyptian law defines a medical act (*'amal tibbî*) as "any act necessary or desirable for the use by a doctor of his right to practice medicine." Thus, there are many conditions so that an act may be considered as medical: that the individual performing the act be fully authorized to treat patients (*tarkhîs qânûnî bi-muzâwalat al-`ilâj*); having obtained beforehand the patient's consent (*ridâ' al-marîd*); that there be a therapeutic purpose (*qasd al-`ilâj*). This third requirement is justified by the fact that to cure the patient is the aim on which rests the doctors' right to practice medicine and surgery. Therapeutic purpose requires good faith (*husn al-niyya*). Since integrity of the body (*salâmat al-jism*) is a public matter, therapeutic purpose makes up an essential condition. When there is no such purpose, the doctor puts himself outside the realm of legality, even though he may have acted with his patient's consent (this point is important in order to understand one of the controversies I will discuss further on in my paper). The principle of therapeutic purpose is somehow summarized in

article 14 of decree number 224-1974 of the Ministry of Health that includes ethical rules and the professional oath of medicine: "the doctor has to do everything possible for his patients, to strive to reduce suffering, and to treat them in a sensitive and humane manner."

Law 415-1953 pertaining to medical practice (*muzâwala mihnat al-tibb*) states in its first article that "medical practice and doing surgery are authorized to any Egyptian whose name is registered on the doctors' cause-list at the Ministry of Health and on the register of the Doctors Syndicate." This practice, that is to perform a medical act, is thus limited only to licensed doctors, so far as the act in question is justified by its aim to serve the general interest. Under this condition, there is no limitation to the right of doctors to practice their profession, which is organized by a law that authorizes performing all types of surgical operations necessary to save a human life or to reduce the ill that threatens it, save for exceptional cases provided for by the law. But the practice of this profession is closely linked to this end, outside of which the fact of inflicting injury on someone else's bodily integrity is sanctioned by the criminal code. To put it differently, saving a human life or reducing an ill threatening it are included in the permissive clauses (Criminal Code, art. 7 and 60) that allow one to avoid the sanction normally provided for inflicting injury on someone else's physical integrity (Criminal Code, art. 240). The principle is the same in France where "the doctor's action is justified, if he purposefully inflicts injury on the patient's bodily integrity, because law authorizes it as long as he is pursuing a therapeutic aim." (Penneau 1996:3)

The basic principle is thus the right to bodily integrity (*haqq al-insân fi salâmat al-jism*). All parts of the body, whether they be visible (*zâhira*) or hidden (*bâtina*) are concerned. Furthermore, it is the material nature of the prejudice (*jasâmat al-`udwân*) that is sanctioned, and not the higher value of one organ compared to another (*qîmat al-`udû*). Three elements are taken into consideration. First, preserving the natural functioning of the organs (any act reducing the level of bodily, mental or psychological health of the victim constitutes an injury to bodily integrity). Second, preserving globally and integrally the organs of the body. Finally, relieving from physical and psychological suffering (any act exposing the victim to further suffering thus constitutes an injury to bodily integrity).

To sum up, obtaining legal authorization to perform a medical act (*ibâha tibbiyya*) on the patient's body, which constitutes a departure from the right to bodily integrity, comes under three conditions: being legally authorized to treat patients, therapeutic purpose, and obtaining the patient's consent. Egyptian law imposes the condition of the patient's consent (*ridâ' al-marîd*). This consent must be obtained beforehand (*sâbiq li-l-`amal al-tibbî*), freely given (*hurr*), conscious (*mutabassir*) and given by an individual who has legal authority (*sâdir min dhî ahliyya*). Moreover, consent must stem from conditions of full knowledge of the nature, type, and dangers of the possible consequences of the medical act requiring such consent, and this so that the patient would be

able to express his acceptance or refusal. In cases of incapacity (*'adîm al-ahliyya*, that is, for children under seven years of age) or of reduced capacity (*nâqis al-ahliyya*, that is, not yet of adult age), consent must be obtained from the individual who legally represents the patient.

WHAT LAW ON THE BOOKS SAYS AND DOES NOT SAY

So far, we only got the formal definition proposed by jurisprudence and case law. In this section, I shall show how both constitute efficient instruments in the hands of professionals orienting to "law on the books" for all practical purposes. Then, I shall stress that the same law cannot be taken as an account of the legal practice that led to its writing. In other words, whereas law on the books helps professional actors conducting their action, it does not retrospectively account for the same action.

Law on the books, for all practical purposes

Instead of serving as accounts for past legal actions, jurisprudence and case law are used by law professionals to orient their future legal actions. It means that they serve as prospective guidebooks or milestones for action more than retrospective descriptions of action. Taking them for sources allowing the reconstitution of some factual truth would implicate a triple mistake: omitting to consider that the doctrinal and jurisprudential documents were written for the practical purposes of their future use; neglecting that the same documents take into account the modalities of their elaboration only insofar as it fits their selective care for procedural correctness and legal relevance; forgetting that these documents constitute legal "generalizations" and not factual "singularizations".

In the sociological endeavour we pursue, which mainly aims at describing the activity of judging, law on the books functions as a milestone to which people orient. It is necessary to assess its nature, for it allows catching an amount of features that form the background understanding of people engaged in judicial activities. In this sense, law on the books can be considered as the *terminus a quo* from which law professionals engage into the process of legal characterization. It is therefore one of the sources to which judges, for instance, refer in an intertextual manner in order to give to the pending procedure the form of a judicial ruling. Law on the books can thus be considered as an intertextual support through which judicial work explicitly incorporates some current action within the authority of legal, doctrinal and jurisprudential texts. The idea of intertextuality refers to the work of Bakhtin (Voloshinov, 1973; Bakhtin, 1981; 1986) and to the claim that a text has generally a dialogical and polyphonic dimension. As Matoesian (2001: 108) puts it, this text can

"incorporate the interpenetration of multiple and shifting voices, ideologies, and historical contexts when contextualized to fit the discursive relevancies of a current performance."

Beyond the intertextual nature of rulings, one has to show how they participate in a process of formal abstraction aiming at endowing practitioners with guide marks that will allow them to orient themselves in cases considered similar. In that sense, legal, jurisprudential and doctrinal texts do not care about history but correspond to the practical will to use them as references for all future legal practical purposes. Using Jackson's (1988: 97-111) semiotic language, we can say that these texts have as a practical purpose to be used as underlying schemes of interpretation and evaluation of new cases submitted to law practitioners' attention. By so doing, they set the possibility conditions of certain types of interpretation while foreclosing others (Umphrey, 1999: 404).

To illustrate the point, I shall use a case taken from the Compendium of the Court of Cassation's rulings (Court of Cassation, 1973, Case No. 40, 1983, claim No. 1566, 42nd judicial year). It allows observing how case-law texts are prospectively organized to serve as interpretive schemes in cases which future judges will preemptively characterize as medical mistakes. First, let us note the form taken by facts enunciation (*waqâ'i'*):

> The civil petitioner directly introduced his petition before the Azbakiyya Court of misdemeanours against the first defendant, claiming that the latter, during the month of December 1964, in the district of Azbakiyya, was the cause of a fault (*khata'*), due to his negligence (*ihmâl*), his lack of care (*`adam ihtirâz*) and precaution (*`adam ihtiyât*), and his lack of observance of medical principles that must be followed (*`adam murâ`âtihi li-l-usûl al-tibbiyya al-wâjibiyya al-ittibâ`*), that resulted in the complete loss of the petitioner's eyesight of both eyes. This is because he [the defendant] conducted on him [the petitioner] a surgical operation on both eyes at the same time with the aim to remove the cataract, without making it preceded by the measures and examinations that must be medically performed, since he conducted the operation on the petitioner without notifying him and without him giving his consent, since he operated them [the eyes] without the assistance of an anesthetist and outside any hospital, since he did not compel him [the petitioner] to take some rest and to have a medical follow-up after the operation, but, on the contrary, he [the defendant] abandoned him [the petitioner] in the middle of the street without assistance, and this led to the inflammation of his two eyes, to their tumefaction, and to the supervening of complications that weakened his eyesight. He [the civil petitioner] asked that he be condemned pursuant to Art. 224/1-2 of the Code of Penal Procedure and that he be compelled, together with the company Misr li-l-bitrûl, in its quality of the responsible for civil obligations, to pay a compensation […], the expenses and the retainers […]. Then, he [the civil petitioner] amended his petition and asked a sum of [the double]. The abovementioned court ruled in presence, on 26 June, 1969, pursuant to the provision [stipulated] in the accusation,

> [and decided]: (1) the condemnation of the accused person to pay a fine […]; and (2), with regard to the civil petition, to turn down the means of defence, invoked by the company responsible for civil obligations, according to which the petition was not admissible with regard to anybody else than the person who acted in one's capacity, to declare the petition admissible, and to compel the accused person together with the abovementioned company to pay to the civil petitioner […] a compensation, to the expenses and […] the retainers […]. The accused person, as well as the responsible for civil obligations, introduced an appeal against this ruling. The Cairo Court of First Instance, in its appeals circuit, ruled in presence on 30 April, 1972, [and decided] the admissibility of the appeal with regard to its form and the confirmation of the ruling against which the appeal was lodged as to the penalty [viz., the fine] and its amendment as to the compensation, limiting it […], plus the expenses corresponding to the two degrees of jurisdiction and […] the retainers. Both the condemned person and the responsible for civil obligations decided to appeal against this ruling by the way of cassation.

This presentation of the case facts, which takes place in the publication of the Court of Cassation's rulings subsequently to the summary of the legal grounds of the ruling, obviously reflects the prospective orientation of the text. Factuality is reduced to such a minimal level that it presents a standardized face, so that it is made easy for a virtual future judge to make a judgement of relative similarity between the case under his scrutiny and the precedent constituted by the case at hand. The description of the fault that led to the condemnation is not detailed, but concentrates on the contrary on the sole elements among case facts that might have some legal relevance. In our case (a case of medical responsibility), it means the elements constitutive of a medical act and its conditions. Doctrine, jurisprudence and legislation (Qâyid, 1987) define medical act (*'amal tibbî*) as "any action necessary or desirable for the exercise by a physician of his right to practice medical profession" and submit it to three conditions: that its performer be legally authorized to dispense his care (*tarkhîs qânûnî bi-muzâwalat al-'ilâj*); that the patient expressed his consent (*ridâ' al-marîd*); that there be a therapeutic intent (*qasd al-'ilâj*). Facts description, as processed in our case by the Court of Cassation, is clearly organized around this issue of knowing whether these elements are gathered or not. The case that is processed here is stripped of its singularity and serves a basis for a generalizing process on which some future virtual judge will lean in order to characterize the new factuality that will be submitted to him.

Even before the enunciation of case facts, however, the Compendium of the Court of Cassation's rulings enumerates a list of keywords referring to the formulation of rules concerning legal questions raised to the Court. This summarized enumeration proceeds in two steps. First, the enumeration in its most condensed form:

(a) appeal […]

(b) criminal responsibility – civil responsibility – fault – unintentional injury – medicine – trial court – "its jurisdiction regarding the assessment of the fault that is required to engage responsibility"

the trial court's jurisdiction regarding the assessment of the fault that is required to engage criminal and civil responsibility – example from the performing of surgical surgery on both eyes together at the same time that resulted in the loss of eyesight

(c) permissive causes (*asbâb al-ibâha*) – "the physician's work" – criminal responsibility – fault – unintentional injury – medicine

authorisation of physician's work – its condition is that what he performs corresponds to the ground principles of the operation decided – to renounce following these ground principles or to breach them engages criminal responsibility

(d) faulty authorisation (*ibâha khata'*) – crime – "to commit a crime" – criminal responsibility

it is enough that there be only one type among the types of faults enumerated in article 244 of the Code of criminal procedure to open the possibility of penalty for the crime of unintentional injury

(e) evidence (*ithbât*) […]

(f) link of causality […]

(g) civil responsibility […]

Then, the same enumeration in a more expanded form:

1 — […]

2 — If the trial court, in its capacity to assess the fault engaging the criminal or civil responsibility of this who commits it, considered that the petitioner, who is a specialist, had committed a fault when performing the surgery on both eyes at the same time, without it being necessary to go fast in the performance of the surgery considering circumstances [of the case] and circumstances indicated in the technical reports and without having taken all the general precautions to guaranty the result, and without conforming to the compelling precaution that is suitable and to the nature of the method chosen, and that he [viz. the petitioner] has consequently exposed the patient to complications for both his eyes at the same time, a situation that led to the complete loss of his eyesight, [if the trial court has considered it] the degree that was established for the fault is in itself only enough to bring on the petitioner the responsibility at [both] criminal and civil levels.

3 — It is established that the authorisation for performing the activity of physician is made conditional upon the fact that what he performs corresponds to the established scientific ground principles; if he deviates from observing these ground principles or breaches them, criminal responsibility is ascribed to him according to the intentional character of the deed, its result or its insufficiencies and the lack of precautions taken in its implementation.

4 — It is enough as to the existence of the crime of unintentional injury that only one type among the types of fault enumerated in article 244 of the Code of criminal procedure be constituted.

5 — […]

6 — […]

7 — […]

It is only at the last stage that the Court of Cassation's ruling structure is integrally reiterated, adding only few elements to what was summarized previously. This ruling structure is, by the way, not reproduced in the compendia of rules formulated by the Court (*majmû'ât al-qawâ'id allatî qarrarathâ mahkamat al-naqd*). It explicitly appears from the organization of the rulings publication that their presentation mainly targets its forthcoming users. In that sense, Court of Cassation's case law belongs more to the writing of legal principles for all future practical purposes than to the detailed accounting of past facts.

Formal abstraction and hiding of practical circumstances of writing

There is a gap between formal renderings produced in jurisprudence and court rulings, on the one hand, and facts as they are supposed to report them, on the other hand. As Hart (1961: 123) underscores, when speaking of the rule of law: "Particular fact-situations do not await us already marked off from each other, and labelled as instances of the general rule, the application of which is in question; nor can the rule itself step forward to claim its own instances. (…) Canons of 'interpretation' cannot eliminate, though they can diminish, these uncertainties; for these canons are themselves general rules for the use of language, and make use of general terms which themselves require interpretation. They cannot, any more than other rules, provide for their own interpretation." In other words, "legal rules cover an indefinite range of contingent, concrete possibilities. The rules must, in short, be applied, and to specific configurations of circumstances which may never be identical. (…) [T]he precedent having been established, there must still be a judgement as to whether the next occasion is sufficiently similar to fall within the scope of the prior judgement." (Heritage, 1984: 121-122) This can be termed the indexical and reflexive nature of normative phenomena, that is to say, the tendency of events to point towards the norms to which reference is made and towards the signification which these same norms receive through the fact of their implementation in the course of action.

The legal context has, in particular, that it is institutional which gives it three distinct characteristics: the discourse in this context is conditioned by its orientation towards a goal; the interaction can be subject to certain particular constraints and the discourse can be associated with inferential frames and procedures. In the first place, "both lay and professional participants generally

show an orientation to institutional tasks or functions in the design of their conduct, most obviously by the kinds of goals they pursue" (Drew & Heritage, 1992: 22), even though such an orientation could change according to local contingencies of interaction and locally defined status of the interactants. In the second place, the conduct is often shaped in an institutional environment by reference to goal-oriented constraints. Moreover, in view of specific contexts such as in the courtroom, it appears that "participants shape their conduct by reference to powerful and legally enforceable constraints which impart a distinctly 'formal' character to the interaction" (Drew & Heritage, 1992: 23). In the third place, inferences and implications tend to be specifically developed in institutional interaction.

All these characteristics are not without consequence on the system of turns at speaking, the attitude of the interactants, the range of institutional options, the proceduralisation of interaction, the institutionalisation of the incongruity mechanism, the lexical choice, the organisation of the sequence, the standardisation of the schemas of interaction and of professional practices and the asymmetric organisation of interaction. In the legal frame, this asymmetry is particularly to be found in the configuration of exchange around the system of questions and responses and in the different strata of knowledge available to and used by laymen and professionals. In addition, the strongly routinised nature of professional action should be noted. This all means, to return to intentionality, that attention must be given to the characterisations which persons ascribe to each other in real contexts and not to the decontextualised presumptions as to attitude and membership. The institutional frame assigns roles and types of intentions to persons belonging to it, making a number of inferences possible.

The fact that the parties are oriented towards the institutional framework and its procedural implications (the trial) means that they are aware of questions concerning personal involvement and intentions. This research intends to show that the definition of intention is inferred from concrete interactional circumstances and information and is not necessarily deduced from theoretical treatises. In the case of intention, as in other instances, representations concerning the profound nature of conscience are not at work, but rather it is the very practical and concrete orientation of persons towards a very practical and concrete result in an interactional situation inscribed in a legal frame and on the basis of discourse and accounts from which every protagonist understands to draw a certain number of inferences. The latter operate as the basis of an interplay of congruence and incongruity between the typification considered to be normal and the factual accounts. Every protagonist is involved in producing a sense of normality and an account, the facts of which are in line with or demarcate this normality. This obtains in the case of the accused as well of other protagonists: victim, witness and substitute, all of whom tend to produce an account articulating the intentional or non-intentional character of the act and the inferences that follow.

LAW, THE BODY, AND SCIENTIFIC EXPERTISE IN AN EGYPTIAN CONTEXT: THE MEDICO-LEGAL REPORT AND THE AUTHORITY OF SCIENCE IN THE ASCRIPTION OF RESPONSIBILITY

In this section, I concentrate on specific documents: medico-legal reports as produced in two different cases, one concerning the granting of divorce on the ground of harm, the other concerning the condemnation of men for debauchery on the ground of their alleged homosexuality. My aim is to show how medical expertise works in action and in context, that is, how medico-legal reports are embedded within a legal procedure to which they orient both restrospectively and prospectively.

Forensic reports appear in a totally standardized manner. They follow the same structure I shall now follow step by step:

- Introduction

Forensic Medicine, Case No. 701, 1983, personal status, Giza

In the name of God the Clement the Merciful

Ministry of Justice — 150, Forensic medicine of Giza / 84

Medico-legal report
in the case No. 701, Giza plenary, year 83

In application of the Giza personal status (persons) court's decision, I examined the file of the case which was transmitted to us by [the court] in this case and I examined in our office on 30/4/84 the defender […] in order to show whether he suffers from some impotency forbidding him to perform his marital duties and to evaluate this impotency, whether it exists, to when it dates back and whether it is susceptible of treatment. I report what follows: […]

Forensic Medicine, Case No 655, 2001, High State Security

In the name of God the Clement the Merciful

« Ministry of Justice »
Administration of forensic medicine — 33/2001 Forensic medicine –
Office of the forensic physicians' chief — the office

Medico-legal report
of re-examination
in the case No. 655 of the year 2001 before the High State Security

I, doctor […], chairman of the section and chief of forensic physicians,

establish that we completed in our office, at 9 o'clock in the morning of 17/6/2001, on warrant from the State Security Prosecution to us to conduct anew the forensic examination of the accused […] to show whether he had the use, and was used to practice, debauchery from the rear and we established: […]

The ritual formula referring to Islam prefaces the text, followed by the identification of the signatory authority, the identification of the case by its file number, and a title (showing whether this is first or appellate examination). The document establishes from the beginning the institution-like nature of its issuer and therefore the authority it claims.

The report's introduction directly presents protagonists in categorical terms: the physician, the Prosecution, the court, the accused, the defender. These are the many parties one is waiting for in any forensic expertise. The document makes it also easy to read in a transparent way the type of procedure that is followed: criminal procedure, featuring the Prosecution and the accused, or personal status procedure, featuring the court and the defender. To every single element within the categorization device "parties to a trial", there is a set of category-bound rights, duties and activities: issuing the medico-legal report for the forensic physician; mandating the physician to proceed to the examination for the Prosecution or the court; submitting oneself to the examination for the accused or the defender. Finally, the introduction has an announcement effect through its specification of everybody's status and activity and the *raison d'être* and finality of the document.

- Summary of facts and procedures

The report proceeds then to recapitulate the facts that conducted judicial authorities to seize the forensic physician:

Forensic Medicine, Case No. 701, 1983, personal status, Giza

First – Circumstances of the Case

- The [female] petitioner […] introduced this petition against her husband, the [male] defender […], claiming in it that she was the wife of this one in virtue of a legal marriage contract and that she discovered by surprise after marriage that her husband had a constitutive malformation, so that his reproductive organs [suffer] from atrophy that forbids him to have marital relationships with her and consequently forbids her to get pregnant, what lead her to introduce this petition asking [that be issued] a divorce ruling in her favour.

- The [female] petitioner presented the marriage contract document and it is established that marriage [took place] on date of 6/9/1978.

Second: procedures

We examined the case file that was transmitted to us by the court on this affair and we fixed the day of […] for the appointment aimed at performing

it [viz. the examination] well. We informed the two parties to the litigation of this by registered notification that I sent within the legally required delay.

At the fixed day, the [female] petitioner […] went in (identity card No. […], issued by the Imbâba civil service).

The [male] defender went in too. We identified him from his card of the Executants Syndicate.

Both of them reckoned each other during the session. We established the report of this.

Forensic Medicine, Case No. 655, 2001, High State Security

First – Prosecution Memorandum

Considering that facts can be summarized, according to what the major […] established in his report delivered on […], to [the fact] that secret sources indicated the adoption by the accused […] of some extremist deviant ideas aiming at creating sedition and at despising revealed religions and at calling to the practice of abjection and sexual acts contrary to revealed laws, as well as sources indicated that the abovementioned accused had the habit to practice debauchery without discrimination and that he undertook to practice some sexual acts with people who are bound to him and [are] converted to [that] thought by considering it [viz., debauchery] as one of the rituals contrary to revealed laws which they follow in [the performance of] their extremist convictions, and that the accused had the habit to hold feasts at the domicile of some of them and on some boats among which the tourist boat Nariman Queen, which many sexually perverse people attended, and this on a weekly basis on Thursday evening every week, and the abovementioned [man] undertook at the time of these meetings to spread extremist ideas in the milieus [frequented] by these people.

Sources indicated that the accused […] undertook to photograph some of the sexual meetings, to make them develop and print in a photo studio and that he had the habit of spreading some sexual pictures during these meetings as well as his extremist thoughts through the international computer network (internet) in the frame of his spreading his ideas, his convictions and his practice of debauchery, and this so as to attract new people in favour of his movement, beside [the fact] that he printed a book that contains extremist thoughts and some obscene pictures of debauchery practice. The arrest of all the aforementioned accused people took place on the basis of the Prosecution's authorization.

Second – the former medico-legal report

This one [is consigned] under number 82 Cairo jails/2001, Cairo medico-legal area. This one is specific to the completion of the forensic examination on the accused […] on date of 9/6/2001 which concluded with the opinion that it does not appear on the basis of the forensic examination on the mentioned accused [that there are] the signs indicating that he gave himself up to

homosexuality anciently or recently – and this [is the case] while it is known that an adult man can give himself up to homosexuality without it leaving any mark that accuses him through the use of lubricants, by paying strong attention and with both parties' consent.

The summary of facts proceeds in two steps: first, the formulation of the case circumstances; second, the procedures followed in order to produce the medico-legal report. The statement of facts, although it is presented as the neutral recapitulation of events that brought somebody to justice and later on to the forensic physician, positions protagonists in terms that directly attach them to their respective membership categories, with all their category-bound rights, duties and activities. It means the petitioning wife against her defending husband, in the first case, and the police and Prosecution against the accused and his friends, in the second case. The protagonists' embedment in categorical terms produces a double effect: posting the document as the "medico-legal report", obviously; more subtly, presuming the role of each of the parties. In other words, everything is organized to make the document read and interpreted as a sworn scientific authority's official conclusions, but it is done by reproducing the police's, Prosecution's or judge's legal narrative and thus by redoubling its fixing effect of facts and presumptions of responsibility and guilt.

The summary of facts and procedures operates for all legal and procedural practical purposes. It means that its writing is conceived of and published so as to make explicit its embedment within a judicial procedure, with its preceding stages, whose knowledge and respect must be acknowledged, and its forthcoming stages that must be anticipated. Anticipation takes a double shape: on the one hand, the posting of professional competence and procedural correctness, in order to foreclose any questioning concerning the forensic physician's professional value and the respect of formalities; on the other hand, the production of a document relevant for the action of adjudicating, that is, a document that can be used to legally characterize what the accused or the defender is reproached.

- The medico-legal examination

The description of the examination performed on the accused or the defender orients to a different audience:

Forensic Medicine, Case No 701, 1983, personal status, Giza

Third: The Medico-legal Examination

We found a man approximately 30 years old who claimed that he had with his wife normal marital relationships consecutively to his marriage with her. The latter introduced this petition because of other disagreements and the absence of pregnancy.

He stated that he had been subject to surgery on his right testicle and he presented as evidence of this a certificate issued by Fînî hospital, which indicates that the abovementioned entered the hospital on 17/2/83 for a diagnosis of cryptocrchidia, that surgery of the testicle to posit it in its normal place had been performed and that he left the hospital on 26/2/83, that his sexual condition was normal and had no relationship on his virility or his sexual performances.

Upon examining him, we found him in good health; his bodily constitution was normal and he did not bear [the marks of] any constitutive or pathological malformation. We did not observe on him any signs of anaemia or lip cyanosis or any pathological sign on his face or on his lower limbs.

We found that his blood pressure was 125/75. Head and face have a normal appearance and the neck was normal withour any venous swelling veins (*awrada*) or enlargement of the thyroid gland .The examination of thorax was normal and breathing movements were symmetrical on both sides, heart beatings were regular and within normal limits, his addomen was depressible and one did not perceive not feel any visceral mass, and tno hernia.

We found no anomaly of his nervous system, and secondary sexual characters were present .

On local examination, we found his pubic hair within normal limits and his penis circumcised,of a complete development, devoid of congeniral malformations and pathological states, with an urinary meatus in its normal position at the end of the penis, without any fluid issuing from it. We observed that the scar appeared normal, the surgical incision extending from the right *awrabiyya* (?) zone and on the right of the scrotum; examining the scrotum, we found his right testicle , inside the scrotum, of normal development, and of a size within normal limits; there was no hydrocele and the spermatic canal was normal. As for the left testicle, there was nothing particular. There was no sugar nor albumen in a sample of urine

Forensic Medicine, Case No. 655, 2001, High State Security

Third – The Medico-legal Examination by Our Care

The mentioned accused appeared in company of the guard under the leadership of police captain […], police card No. […], and the accused reported to us that he was born on 6/5/1969.

We found [that] the mentioned [accused] was an adult male who had reached the age of approximately 32, with a normal body, who seemed to be of a normal health and muscular force, speaking and walking in a conscious manner, with a sound understanding. His body in general was sane and devoid of the suspected blows, his reproductive organs [being] complete, mature and in a sane state, and his penis circumcised.

We locally examined the anus area and we found him in normal and sane condition. The anus opening was of a normal shape and position, in a sane condition and devoid of recent and ancient traumatic marks. Nervous reflexes

of anus were present and in a normal state. The anal sphincter muscle was of a normal strength and keeps, shut in despite the reiteration of the pressure on both buttocks.

The medico-legal report's syntactic and lexical nature testifies to the forensic physician's orientation to the grounding of his professional authority and to the addressee's scientific identity. The judicial addressee of the document has no interest whatsoever for most of the remarks making up the description of the examination. Moreover, he most probably lacks the scientific background allowing for its understanding. However, these remarks that stage the report's author as a competent physician and forensic directly address the medico-legal authorities who will have to assess the scientific relevance of the report's conclusions. In other words, the medico-legal report is also written for all practical scientific purposes. It means that it manifests its respect for the rules of the medical profession in the performance of anamnesis and it orients to the production of categories relevant to medicine in the diagnosis.

- The opinion

This notwithstanding, the medico-legal report especially aims at producing an opinion addressing judicial authorities:

Forensic Medicine, Case No. 701, 1983, personal status, Giza

The Opinion

According to this, we consider that:

- It comes out from the examination we conducted on … that he seems to be in normal health, that his growth and constitution are normal, and that he bears the signs of virility (*`alâmât al-dhukûra*) in a normal way.

- It does not come out from his medical examination that he suffers from any pathological or constitutional state, be it general or local, that would cause him permanent organic impotence.

- We consider that the defendant, even though from the forensic medical point of view he is devoid of the causes of organic impotence (*`unna `adawiyya*), might probably be affected at the same time by psychological factors which might cause him psychological impotence (*`unna nafsiyya), while knowing that it cannot be conclusively concluded to the existence of this kind of impotence from the clinical examination.*

- It is well known that, in case of psychological impotence, it lasts as long as its causes last, so that it is not possible to determine a precise term or a date of recovery, considering that the necessary period of time depends on the extent of the intrusion of the psychological factor, its type and the sufficiency of the therapy; it also depends on the extent of the wife's readiness to help and to assist in the therapy in particular. If the wife lacks attachment to

her husband, respect for him and readiness to assist him in the therapy, this therapy will be either exceptionally long and arduous, or simply impossible.

Forensic Medicine, Case No. 655, 2001, High State Security

The Opinion Drawing from what precedes in our examination of the Prosecution's report and in the former forensic report and from our re-examination of the accused, we state:

- that the aforementioned is an adult male that reached the age of approximately 32 years, of an ordinary body, of an ordinary health and muscular strength, devoid of the suspected wounds.

Following our local examination of his anal area, [it is clear that] he does not present the forensic marks of a repeated homosexual use of the anuq by a former penetration.

- that it is known that touching and external sexual contact does not leave any mark that can be testified to on the occasion of examination.

- that it is equally known that the homosexual use for penetration, one time or several, with regard to adults, lubricants and by taking of the adequate position between the two parties (the subject (*al-fâ`il*) and the object (*al-maf`ûl bihi*)), does not leave any mark that can be testified to on examination.

Written on date of 18/6/2001 the section chairman

Chief of forensic physicians

[…]

The opinion expressed in the medico-legal report seeks to produce a medical statement relevant from the legal point of view. However, this opinion uses its scientific status to enlarge its sphere of competence and claim its authority on the judicial institution.

First, the forensic physician's opinion foregrounds his scientific authority. In both reports, he invokes his conducting of the examination according to the rules of the profession and concludes to the inexistence of the suspected symptoms ("Drawing from […] our examination of the Prosecution's report and in the former forensic report and from our re-examination of the accused […], we state […]"; "It comes out from the examination we conducted on […] that he seems to be in normal health, that his growth and constitution are natural […] It does not come out from his medical examination that he suffers from any pathological or constitutional state […]"). The wording is peremptory. It orients to the legal characterizations that were left open to the physician in the document that mandated him. The accused or the defender was submitted to examination as he was suspected to suffer from impotency or to have had homosexual relationships. The forensic physician is asked to validate or invalidate this prior characterization. Actually, in both cases, through a medical formulation, he invalidates the characterization submitted to his expert look, be it impotency constituting a ground for judicial divorce ("It does not come out from his medical examination

that he suffers from any pathological or constitutional state, be it generally or objectively, that would cause him permanent organic impotence") or debauchery by the practice of homosexuality ("he does not present the forensic marks of a repeated homosexual use of the rear by a former penetration").

However, in both cases, the forensic physician proceeds beyond the question he was asked *stricto sensu*. In the case of divorce on the ground of harm caused by the husband's impotency, the report concludes to the fact that "the defendant, even though from the forensic medical point of view he is devoid of the causes of organic impotence, might probably be affected at the same time by psychological factors which might cause him psychological impotence, while knowing that it cannot be conclusively concluded to the existence of this kind of impotence from the clinical examination." With regard to the accusation of debauchery on the ground of homosexual relationships, the report states "that it is equally known that the homosexual use by penetration, one time or several, with regard to adults, with the use of lubricants and by the taking of the adequate position between the two parties (the subject and the object), does not leave any mark that can be testified to on examination." In other words, the medico-legal report makes in both cases a feat of strength: it validates accusation's or petitioner's characterization on the ground of an argument that cannot be materially founded and without producing the material evidence of what it was asked to validate. Where a strict submission of the forensic physician to the primacy of law would require he limits his opinion to the precise question he was asked (the material evidence of either impotency or homosexuality), the scientific authority on which he bases his action, which he posts, and which grounds the ruling permits him to act *ultra petita*, in the jurists' jargon, that is, beyond the authority he has, trespassing thereby on the judge's discretionary power.

So, I observed and described where and how, in two cases, the authority of science operates in the law. Whereas forensic reports' language was still probabilistic (the use of the conditional in the impotency case: "the defendant […] might probably be affected at the same time by psychological factors which might cause him psychological impotence"; additional conditions in the homosexuality case: "the homosexual use by penetration […] with regard to adults, with the use of lubricants and by the taking of the adequate position […] does not leave any mark that can be testified to on examination"), it takes the status of established fact at the level of the ruling. In the ruling deciding on the petition for divorce on the ground of the husband's impotency, the judge transforms what was presented by the physician as a possibility into certitude ("Considering that […] the forensic physician established that the defendant, although he is in normal health and has a natural growth, is affected by psychological impotency resulting from psychological factors that affected him"; see Dupret, 2005). In the ruling deciding on the accusation of debauchery on the ground of homosexuality, the marks of homosexual relationships are considered probing, while their inexistence does not clear the accused, providing other evidences are presented.

CONCLUSION

Medico-legal reports are products of work of both medical and legal enunciation. Law and science do not constitute two distinct forms of truth production. They are two among many pragmatic modes of enunciation, and both truth-finding engines are largely goal-oriented and context-specific. In one and the same document, one can observe different modes of enunciation that do not oppose more than they absorb each other, but proceed in parallel because they orient to different ends and address different audiences. To put it bluntly, science looks for causes and law, for responsibility. Responsibility needs causes in order to be allocated to somebody and causes are morally linked to their outcome: responsibility. However, causation and responsibility ascription work in a partly autonomous manner.

In forensic reports, the body is made of complex and dialogical inscriptions. By inscription, I mean that there is a series of transformations that lead from an action or a bodily state to the examination of the bodily marks resulting from this action or state and, eventually, to the production of a disincarnate document, that in turn will ground many medical and legal decisions using reports as an objective basis. In this sense, medico-legal reports are both a generalization that goes from lived facts to written conclusions and a specification that goes from written conclusion to some decision-taking influencing real courses of action. These inscriptions are dialogical in the sense that they retrospectively call back a series of texts and former utterances, from the plaintiff's petition to the ruling, via police report, testimonies and legislative texts; they also prospectively anticipate the future uses that will be made of it by medical and legal instances. All these textual elements make up the dossier of a case, which is articulated around a body disincarnate, textualised and formatted for its medico-legal usage.

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